

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,
1030 15th Street NW, B255
Washington, DC 20005

Plaintiff,

v.

U.S. BUREAU OF PRISONS,
320 First Street NW
Washington, DC 20534

and

U.S. DEPARTMENT OF JUSTICE,
950 Pennsylvania Avenue NW
Washington, DC 20530

Defendants.

Case No. 19-cv-2272

COMPLAINT

1. Plaintiff American Oversight brings this action against the U.S. Bureau of Prisons and the U.S. Department of Justice under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendants have failed to comply with the applicable time-limit provisions of FOIA, American Oversight is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agencies from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan, non-profit section 501(c)(3) organization primarily engaged in disseminating information to the public. American Oversight is committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information gathered, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant U.S. Bureau of Prisons (“BOP”) is a component of the U.S. Department of Justice, a department of the executive branch of the U.S. government, headquartered in Washington, D.C., and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). BOP has possession, custody, and control of the records that American Oversight seeks.

7. Defendant U.S. Department of Justice (“DOJ”) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). The Office of Information Policy (“OIP”), the Office of the Attorney General (“OAG”), and the Office of the Deputy Attorney

General (“ODAG”) are components of DOJ. OIP processes FOIA requests on behalf of certain other components of DOJ, including OAG and ODAG. DOJ has possession, custody, and control of the records that American Oversight seeks.

STATEMENT OF FACTS

8. In late January and early February 2019, the Brooklyn Metropolitan Detention Center (“MDC”), operated by BOP, reportedly experienced heat and power outages that caused people detained in that facility to experience inhumane conditions, including extreme cold. *See* Annie Correal, *No Heat for Days at a Jail in Brooklyn Where Hundreds of Inmates Are Sick and Frantic*, N.Y. Times, Feb. 1, 2019, <https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat.html>. During this period detainees were also reportedly denied access to legal counsel and relatives. *See id.* In February 2019, American Oversight submitted four FOIA requests to BOP and DOJ seeking, broadly speaking, documents related to the Brooklyn MDC, BOP and DOJ responses to conditions at the MDC, and documents containing key terms that may be related to the MDC.

BOP Leadership Communications FOIA

9. On February 27, 2019, American Oversight submitted a FOIA request to BOP seeking the following:

All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) of the following BOP officials concerning the Metropolitan Detention [Center] in Brooklyn:

- 1) Acting Director of the Bureau of Prisons, Hugh J. Hurwitz, and any other political appointee* or career member of the Senior Executive Service (SES) within the office of the Director of BOP;

- 2) Any individual performing the duties and functions of the Deputy Director of BOP;
- 3) Northeast Regional Director J. Ray Ormond, and any other political appointee* or career member of the Senior Executive Service (SES) within the office of the Northeast Regional Director.

Please provide all responsive records from January 1, 2019, through the date of the search.

*“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a Non-career SES, any Schedule C employees, or any persons hired under Temporary Non-career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

10. By letter dated March 26, 2019, BOP acknowledged receipt of the BOP Leadership Communications FOIA and assigned it reference number 2019-02982.

11. American Oversight has not received any further communication from BOP regarding this FOIA request.

BOP Key Terms Communications FOIA

12. Also on February 27, 2019, American Oversight submitted a FOIA request to BOP seeking the following:

All email communications (including email messages, email attachments, and calendar invitations/entries) of Acting Director of the Bureau of Prisons, Hugh J. Hurwitz, Northeast Regional Director J. Ray Ormond, or Brooklyn Metropolitan Detention Center Warden Herman Quay, containing any of the following terms:

- a. Heat
- b. “Heating system”
- c. temperature
- d. Blanket
- e. Blankets
- f. Electricity
- g. “Federal Defenders”
- h. Nadler
- i. Velasquez
- j. “von Dornum”

- k. Protest
- l. Protests
- m. "hot water"
- n. "hot meal"
- o. "hot meals"
- p. "power outage"
- q. "minimally impacted"
- r. "air handler"
- s. "cold air"
- t. "Unit I62"
- u. Analisa
- v. Annalisa
- w. "Judge Torres"
- x. Spilke
- y. Kunstler
- z. "water damage"
- aa. Blackout
- bb. "black-out"
- cc. "black out"
- dd. "lock down"
- ee. "locked down"
- ff. "electrical fire"
- gg. Zimian
- hh. Tabb
- ii. "Con Ed"
- jj. "Con Edison"
- kk. "ConEd"

Please provide all responsive records from January 15, 2019, through the date of the search.

13. By letter dated March 26, 2019, BOP acknowledged receipt of the BOP Key Terms Communications FOIA and assigned it reference number 2019-02980.

14. American Oversight has not received any further communication from BOP regarding this FOIA request.

BOP MDC Complaints FOIA

15. Also on February 27, 2019, American Oversight submitted a FOIA request to BOP seeking the following:

1. All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) of BOP officials and employees at the Metropolitan Detention [Center] (MDC) in Brooklyn regarding any of the following topics:
 - a. The provision of heat, hot water, or medical care to people detained at MDC;
 - b. The ability of people detained at MDC to communicate with legal counsel;
 - c. Any limitation on the ability of people detained at MDC to meet with visitors, legal counsel, or any other persons not detained at MDC;
 - d. Complaints by people detained at the MDC regarding the conditions of their confinement, including complaints regarding;
 - e. Problems with services rendered by contractors working at the MDC facility; or
 - f. Requests by city, state, or federal government officials to visit, inspect, or otherwise gain access to the MDC.
2. All records reflecting complaints filed by people detained at MDC regarding any of the following:
 - a. The provision of heat, hot water, or medical care to people detained at MDC;
 - b. The ability of people detained at MDC to communicate with legal counsel;
 - c. Any limitation on the ability of people detained at MDC to meet with visitors, legal counsel, or any other persons not detained at MDC;
 - d. Complaints by people detained at the MDC regarding the conditions of their confinement, including complaints regarding;
 - e. Problems with services rendered by contractors working at the MDC facility; or
 - f. Requests by city, state, or federal government officials to visit, inspect, or otherwise gain access to the MDC.

Please provide all responsive records from January 1, 2019, through the date of the search.

16. By letter dated March 26, 2019, BOP acknowledged receipt of the BOP MDC Complaints FOIA and assigned it reference number 2019-02979.

17. American Oversight has not received any further communication from BOP regarding this FOIA request.

DOJ Leadership Communications FOIA

18. Also on February 27, 2019, American Oversight submitted a FOIA request to DOJ seeking the following:

All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) of any political appointee* in the Office of the Attorney General or the Office of the Deputy Attorney General concerning the Metropolitan Detention Facility in Brooklyn.

Please provide all responsive records from January 1, 2019, through the date of the search.

*“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a Non-career SES, any Schedule C employees, or any persons hired under Temporary Non-career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

19. By letter dated March 15, 2019, DOJ acknowledged receipt of DOJ Leadership Communications FOIA and assigned it tracking number DOJ-2019-002598.

20. American Oversight has not received any further communication from DOJ regarding this FOIA request.

Exhaustion of Administrative Remedies

21. As of the date of this complaint, Defendants have failed to (a) notify American Oversight of any determination regarding its FOIA requests, including the scope of any responsive records Defendants intend to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

22. Through Defendants' failure to respond to American Oversight's FOIA requests within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

Failure to Conduct Adequate Searches for Responsive Records

23. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

24. American Oversight properly requested records within the possession, custody, and control of Defendants.

25. Defendants are an agency and a component thereof subject to FOIA, and they must therefore make reasonable efforts to search for requested records.

26. Defendants have failed to promptly review agency records for the purpose of locating those records that are responsive to American Oversight's FOIA requests.

27. Defendants' failure to conduct an adequate search for responsive records violates FOIA and applicable regulations.

28. Plaintiff American Oversight is therefore entitled to injunctive and declaratory relief requiring Defendants to promptly make reasonable efforts to search for records responsive to American Oversight's FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

29. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

30. American Oversight properly requested records within the possession, custody, and control of Defendants.

31. Defendants are an agency and a component thereof subject to FOIA, and they must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

32. Defendants are wrongfully withholding non-exempt agency records requested by American Oversight by failing to produce non-exempt records responsive to its FOIA requests.

33. Defendants are wrongfully withholding non-exempt agency records requested by American Oversight by failing to segregate exempt information in otherwise non-exempt records responsive to American Oversight's FOIA requests.

34. Defendants' failure to provide all non-exempt responsive records violates FOIA and applicable regulations.

35. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Defendants to promptly produce all non-exempt records responsive to its FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendants to conduct a search or searches reasonably calculated to uncover all records responsive to American Oversight's FOIA requests;
- (2) Order Defendants to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to American Oversight's FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to American Oversight's FOIA requests;
- (4) Award American Oversight the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant American Oversight such other relief as the Court deems just and proper.

Dated: July 30, 2019

Respectfully submitted,

/s/ Daniel A. McGrath

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